

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA, and)	Civil Action No. _____
STATE OF COLORADO,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
HOME DEPOT USA, INC.,)	
)	
Defendant.)	
_____)	

COMPLAINT

Plaintiffs, the United States of America, by authority of the Attorney General of the United States, at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), and the State of Colorado ("State"), by the authority of the Colorado Attorney General's Office, at the request of the Colorado Department of Public Health and Environment, by and through their undersigned attorneys, allege as follows:

INTRODUCTION

1. This is a civil action for injunctive relief and civil penalties brought pursuant to the Clean Water Act, 33 U.S.C. § 1319(b) and (d), and the Colorado Water Quality Control Act ("CWQCA"), §§ 25-8-607 and -608, C.R.S., against Home Depot USA, Inc. ("Home Depot" or "Defendant") for the discharge of pollutants in storm water without a permit in violation of 33 U.S.C. § 1311 and § 25-8-501(1), C.R.S.; for failing to provide information in violation of 33

U.S.C. § 1318 and § 25-8-304(1), C.R.S.; and for violations of the conditions of permits issued pursuant to 33 U.S.C. § 1342 for discharge of pollutants in storm water from construction sites in violation of 33 U.S.C. § 1311, including, among others, the conditions of the Colorado General Permit issued by the State of Colorado pursuant to §§ 25-8-501 to -503, C.R.S. and the federal Clean Water Act, 33 U.S.C. § 1342.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345 and 1355 and 33 U.S.C. § 1319(b). This Court has jurisdiction over the claims of the State pursuant to 28 U.S.C. § 1367 (supplemental jurisdiction).

3. Venue is proper in this District pursuant to 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391 and 1395, because Home Depot conducts business in this District, and because certain of the violations occurred in this District.

4. Notice of the commencement of this action has been given to the States of Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, Texas, Utah, and Wisconsin, in accordance with 33 U.S.C. § 1319(b).

DEFENDANT

5. Home Depot is a corporation organized under the laws of Delaware and is a “person” as defined in 33 U.S.C. § 1362(5) and 40 C.F.R. § 122.2, and in § 25-8-103(13), C.R.S. of the CWQCA.

6. Home Depot is a corporation doing business in stores in all 50 states of the United

States, the District of Columbia, Puerto Rico, U.S. Virgin Islands, 10 Canadian provinces, Mexico and China. Home Depot's principal place of business is in Atlanta, Georgia.

7. Home Depot has constructed and is currently constructing home improvement retail stores for its ownership and/or operation on various pieces of property owned and/or operated by Home Depot throughout the United States, including in this District. Home Depot operates over 1800 stores in the United States and constructs numerous new stores each year.

STATUTORY AND REGULATORY AUTHORITY

8. The Clean Water Act is designed to restore and maintain the chemical, physical and biological integrity of the nation's waters. 33 U.S.C. § 1251(a).

9. To accomplish the objectives of the Act, 33 U.S.C. § 1311(a) prohibits the discharge of pollutants by any person except in certain circumstances, including in compliance with a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to Section 402, 33 U.S.C. § 1342. See also CWQCA, §§ 25-8-501 to 503, C.R.S., and the "Colorado Discharge Permit System Regulations," Regulation No. 61 (5 C.C.R. 1002-61).

10. Section 308 of the Clean Water Act, 33 U.S.C. § 1318, requires owners and operators of point sources to submit information to the EPA as needed to carry out the objectives of the Clean Water Act, including the NPDES permit program of Section 402. See also CWQCA §§ 25-8-304(1) and -501(1).

11. The Clean Water Act requires a permit for storm water discharges associated with industrial activity. 33 U.S.C. § 1342(p). See also Regulation No. 61 (5 C.C.R. 1002-61), § 61.3(2).

12. Under EPA's regulations, persons who discharge or who propose to discharge

“storm water associated with industrial activity” are required to apply for an individual permit or seek coverage under a promulgated storm water general permit. 40 C.F.R. §§ 122.26(c), 122.21(a), (c), 122.28. The regulations define the term “storm water discharge associated with industrial activity” to include storm water discharges from construction activity, including clearing, grading, and excavation activities, that result in a disturbance of five or more acres of total land area. 40 C.F.R. § 122.26(b)(14)(x). Construction activity also includes the disturbance of less than five acres of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than five acres. *Id.* In applying for coverage under a storm water individual or general permit, a potential permittee must provide the necessary information on the basis of which EPA or the state permitting agency may evaluate the appropriateness of the issuance of and the terms of any such permit.

13. Under 40 C.F.R. § 122.21(c), a discharger proposing a new discharge of storm water associated with construction activity covered by § 122.26(b)(14)(x) must submit an application 90 days before the date construction is to commence, or by the deadlines provided by the terms of any applicable general permit. *See* 40 C.F.R. § 122.28(b)(2).

14. In 1992, EPA issued a Final NPDES General Permit for Storm Water Discharges from Construction Sites. 57 Fed. Reg. 41176, 41209 (Sept. 9, 1992). EPA has, on various occasions, subsequently modified and reissued this general permit. *See* 63 Fed. Reg. 7858-7906 (Feb. 17, 1998); 63 Fed. Reg. 36490-36519 (July 6, 1998); 65 Fed. Reg. 25122-25145 (Apr. 28, 2000); 68 Fed. Reg. 39087-01 (July 1, 2003) (generally “Applicable Permit”).

15. Pursuant to the Act, states may issue their own storm water permits if they are authorized by EPA to do so. 33 U.S.C. § 1342(b). Most states are so authorized and have issued

their own general permits governing discharges of storm water associated with construction activities (generally, "Applicable Permit"). For example, Colorado has been so authorized and has issued its own general permit. See Colorado General Permit for Storm Water Discharges Associated with Construction Activity No. COR - 030000 (the "Colorado General Permit"). For states that have not been authorized, EPA remains the permitting authority, and the federal general permit applies (generally, "Applicable Permit").

16. Though they differ in some of the details, in general, both the federal and state general permits impose similar requirements on the owners and operators of construction sites. Generally, a person must obtain coverage under a general permit for discharging storm water if that person engages in construction that meets the definition of "industrial activity" by 40 C.F.R. § 122.26(b)(14)(x), and either has operational control of construction project plans and specifications or has day-to-day operational control of those activities which are necessary to ensure compliance with permit conditions. 33 U.S.C. § 1311(a); 1342(p); 40 C.F.R. § 122.21; 40 C.F.R. Part 122. See also CWQCA §§ 25-8-501(1), C.R.S., and Regulation No. 61 (5 C.C.R. 1002-61), § 61.3(2).

17. In general, a person described in Paragraph 16 must submit a complete Notice of Intent ("NOI") to be covered by the general permit by a specific deadline. The Federal General Permit requires the NOI to be submitted at least seven days prior to the commencement of construction activities. Federal General Permit, ¶¶ 2.1B, 2.3A. The Colorado General Permit, for example, requires the NOI (referred to as an "application") to be submitted at least ten calendar days prior to the commencement of construction activities. Colorado General Permit, Part 1.A.4.

18. In general, under the general permits, any person subject to the permit is required to develop a storm water pollution prevention plan ("SWPPP"; in Colorado, referred to as a "storm water management plan" or "SWMP") which sets forth a plan for minimizing and eliminating to the extent feasible discharges of pollutants in storm water associated with construction activities. Under each permit, the SWPPP must meet specific requirements and include certain information. See, e.g., Colorado General Permit, Parts I.B and I.C.

19. A central requirement of the SWPPP is the selection of best management practices ("BMPs"). BMPs are management practices implemented "to prevent or reduce the discharge of pollutants to waters of the United States." Federal CGP, Appendix A. These practices include measures to prevent erosion (such as the scheduling of the project to minimize the amount of land that is being graded at any particular time) and measures to capture sediment before it leaves the site (such as silt fences and sedimentation basins).

20. The permits also require the permittee to implement the SWPPP and to properly operate and maintain the BMPs.

21. The permits impose additional requirements, including inter alia: inspection of the site during construction; maintenance of the SWPPP and sometimes other records at the site; and final stabilization of the site followed by termination of permit coverage.

22. The Act authorizes the Administrator of EPA "to commence a civil action for appropriate relief, including a permanent or temporary injunction," when any person is in violation of 33 U.S.C. §§ 1311, 1318, or of any permit issued pursuant to 33 U.S.C. § 1342. 33 U.S.C. § 1319(b). The CWQCA authorizes injunctive relief at § 25-8-607, C.R.S.

23. The Act provides, in part, that any person who violates 33 U.S.C. §§ 1311, 1318,

or any permit issued pursuant to 33 U.S.C. § 1342, shall be subject to a civil penalty not to exceed \$27,500 per day for each such violation occurring after January 31, 1997 through and including March 15, 2004, and \$32,500 per day for each such violation thereafter. 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4; 62 Fed. Reg. 7121-01 (Feb. 13, 2004) (codified at 40 C.F.R. pt. 19). Section 25-8-608(1), C.R.S., provides that violations of the CWQCA shall be subject to civil penalties not to exceed \$10,000 per day for each violation.

FACTUAL ALLEGATIONS

24. In inspections at Home Depot construction sites conducted primarily between 2000 and 2003, EPA found a pattern of failures to obtain coverage under Applicable Permits and to comply with the requirements of Applicable Permits for the discharge of storm water from these construction sites. This pattern was evident from inspections of 15 construction sites in 7 states. Additional information was obtained from Home Depot's responses to information requests issued by EPA pursuant to Section 308 of the Act, which provided evidence of additional violations at Home Depot Sites. Attachment A lists the Home Depot sites for which EPA has information from inspections, information request responses, or otherwise concerning violations of the storm water requirements of the Clean Water Act.

25. Home Depot constructed a store on each of the sites listed on Appendix A, which construction activity resulted in the disturbance of at least 5 acres at each of these sites.

26. Home Depot controlled the plans and specifications for the construction of its stores, or otherwise met the definition of operator under 40 C.F.R. § 122.2, and the Applicable Permit, and was therefore required to obtain NPDES permit coverage for its storm water

discharges from construction activities, and to comply with all applicable requirements and conditions under the Act, its regulations, and the Applicable Permit. 33 U.S.C. § 1342; 40 C.F.R. §§ 122.21, 122.26.

27. The construction of Home Depot stores resulted in the addition of “pollutants,” including rock, sand, cellar dirt, industrial waste, solid waste, and other pollutants, to storm sewers, ditches, or other conveyances that discharge to streams, creeks, and other water bodies that, on information and belief, are “waters of the United States,” within the meanings of Section 502(6) and (7), of the Act, 33 U.S.C. § 1362(6), (7), and 40 C.F.R. § 122.2, and “state waters” in Colorado, within the meaning of CWQCA §§ 25-8-103(15) and 25-8-103(19), C.R.S.

28. Home Depot sites, themselves, as well as the storm sewers, ditches, or other conveyances referenced in Paragraph 27 above, constitute “point source[s]” within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14), and CWQCA at § 25-8-103(14), C.R.S.

29. By causing the addition of such pollutants to waters of the United States or the State through point source(s), Home Depot has engaged in the “discharge of pollutants” within the meanings of Sections 301 and 502(12) of the Act, 33 U.S.C. §§ 1311 and 1362(12), 40 C.F.R. § 122.2, and CWQCA at § 25-8-103(3), C.R.S.

30. At the stores listed on Appendix A and at times relevant to this complaint, Home Depot was a person that proposed to discharge or who otherwise was required to timely apply for coverage under the Applicable Permit. 33 U.S.C. § 1342(p), 40 C.F.R. §§ 122.21(a), (c), 122.26(c), and 122.28.

31. Home Depot failed to timely submit the information required to apply for or obtain coverage under the Applicable Permit at some of the stores listed on Appendix A,

including, but not necessarily limited to, Home Depot sites in Seabrook, NH, Austin, TX, Garden City, KS, Blue Springs, MO, Porterville, CA, Provo, UT, Aurora, CO (Saddlerock), and Aurora, CO (Pioneer Hills). At certain sites, including, but not necessarily limited to, Home Depot sites in Ellsworth, ME, Plymouth, MI, American Fork, UT, and Surprise, AZ, Home Depot never applied for or obtained coverage under the Applicable Permit at all.

32. EPA obtained evidence, through inspections, information requests or otherwise, of violations of the Applicable Permit at some or all of the sites listed on Appendix A for which Home Depot did obtain coverage under the Applicable Permit, including but not limited to the Evergreen, CO site, the Pioneer Hills store in Aurora, CO, and the Saddlerock store in Aurora, CO. Violations of storm water requirements at these and other sites include, but are not necessarily limited to: failure to install and maintain storm water controls (such as a vehicle track out pad, inlet protection, silt fencing to minimize off-site sediment and erosion runoff); failure to properly design or implement BMPs; failure to prepare an adequate SWPPP; failure to conduct inspections; and failure to conduct inspections in accordance with the permit requirements.

FIRST CLAIM FOR RELIEF

DEFENDANT VIOLATED THE
REQUIREMENTS OF THE APPLICABLE PERMITS

33. Plaintiff realleges and incorporates by reference Paragraphs 1 through 32.

34. On information and belief, Home Depot violated the terms and conditions of the Applicable Permit at sites listed in Appendix A.

35. Unless enjoined, these violations will continue or will recur at other construction

sites.

36. Pursuant to 33 U.S.C. § 1319, Home Depot is liable for injunctive relief and civil penalties of up to \$27,500 per day for each such violation occurring after January 31, 1997 through and including March 15, 2004 and \$32,500 per day for each such violation thereafter per day per violation.

37. Pursuant to Colorado law, Home Depot is liable for injunctive relief and civil penalties of not more than \$10,000 per day for each violation that occurred at a site within Colorado that is listed on Appendix A.

SECOND CLAIM FOR RELIEF

DEFENDANT DISCHARGED POLLUTANTS IN
STORM WATER WITHOUT AN APPLICABLE PERMIT

38. Plaintiff realleges and incorporates by reference Paragraphs 1 through 32.

39. On information and belief, Home Depot discharged pollutants in storm water to waters of the United States without coverage under an Applicable Permit in violation of CWA Section 301, 33 U.S.C. § 1311 at one or more sites listed in Appendix A.

40. Unless enjoined, these violations will continue or will recur at other construction sites.

41. Pursuant to 33 U.S.C. § 1319, Home Depot is liable for injunctive relief and civil penalties of up to \$27,500 per day for each such violation occurring after January 31, 1997 through and including March 15, 2004 and \$32,500 per day for each such violation thereafter per day per violation.

42. Pursuant to Colorado law, Home Depot is liable for injunctive relief and civil

penalties of not more than \$10,000 per day for each violation that occurred at a site within Colorado that is listed on Appendix A

THIRD CLAIM FOR RELIEF

DEFENDANT FAILED TO TIMELY SUBMIT THE INFORMATION
REQUIRED TO OBTAIN COVERAGE UNDER AN APPLICABLE PERMIT

43. Plaintiff realleges and incorporates by reference Paragraphs 1 through 32.

44. On information and belief, Home Depot failed to timely submit the information required to obtain coverage under an Applicable Permit for the discharge of storm water associated with its construction activities from certain sites listed in Appendix A by the deadline required by EPA's NPDES regulations and the Applicable Permit in violation of CWA Section 308, 33 U.S.C. § 1318.

45. Pursuant to 33 U.S.C. § 1319, Home Depot is liable for injunctive relief and civil penalties of up to \$27,500 per day for each such violation occurring after January 31, 1997 through and including March 15, 2004 and \$32,500 per day for each such violation thereafter per day per violation.

46. Pursuant to Colorado law, Home Depot is liable for injunctive relief and civil penalties of not more than \$10,000 per day for each violation that occurred at a site within Colorado that is listed on Appendix A.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs the United States of America and the State of Colorado

respectfully requests that this Court:

- A. Order Defendant to comply with the terms of the Act and the conditions of Applicable Permits at its construction sites, including by, among other things, the development and implementation of appropriate storm water pollution prevention plans, the application of BMPs to minimize or eliminate discharges of pollutants from the site, and the implementation of corporate policies designed to achieve and assure compliance with the Applicable Permit and the Act;
- B. Assess civil penalties against Defendant of up to \$27,500 per day for each such violation occurring after January 31, 1997 through and including March 15, 2004 and \$32,500 per day for each such violation thereafter per day for each violation;
- C. Award the United States and Colorado their costs and disbursements in this action; and
- D. Grant any such further relief as this Court deems just and proper.

Respectfully submitted,

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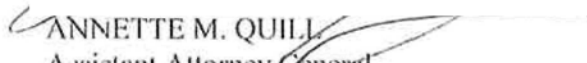
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Appendix A

List of Sites

Home Depot Cities/Sites
Source of discovered violation
EPA Region where site/city located

Ellsworth, ME	308	1
Middletown, RI	308	1
Somerset, MA	308	1
Seabrook, NH	308	1
Londonderry, NH	308	1
Nashua, NH	308	1
N. Hampton, NH	308	1
S. Merrimack, NH	308	1
Rockland, MA	308	1
W. Roxbury, MA	308	1
Tewksbury, MA	308	1
Natick, MA	308	1
Avon, MA	308	1
N. Dartmouth, MA	308	1
Waltham, MA	308	1
Leominster, MA	308	1
Taunton, MA	308	1
E. Springfield, Wilbraham, MA	308	1
Plymouth, MA	308	1
Concord, NH	308	1
Manchester, NH	308	1
Auburn, MA	308	1
Methuen, MA	308	1
Salem, MA	308	1
Rochester, NH	308	1
Tilton, NH	308	1
Mahwah, NJ	308	2
Thompson/Monticello, NY	308	2
Ft. Lauderdale, FL	308	4
Fuquay-Varina, NC	308	4
Palm Coast, FL	308	4
Suwannee, GA	308	4

Owensboro, KY	308	4
S. Huntsville, AL	308	4
Mishawaka, IN	308	5
Willmar, MN	308	5
Auburn Hills, MI	308	5
Crawfordsville IN	308	5
Fond Du Lac, WI	308	5
Alamogordo, NM	308	6
Lawton, OK	308	6
Garden City, KS	308	7
Omaha, NE	308	7
Blue Springs, MO	308	7
Provo, UT	308	8
Helena, MT	308	8
Surprise, AZ	308	9
Bullhead City, AZ	308	9
Beaverton, OR	308	10
Hattiesburg, MS	inspection	4
Plymouth, MI	inspection	5
Woodhaven, MI	inspection	5
Harper Woods, MI	inspection	5
Canton Twp., MI	inspection	5
College Station, TX	inspection	6
Lewisville, TX	inspection	6
Wylie, TX	inspection	6
Austin, TX	inspection	6
American Fork, UT	inspection	8
Aurora, CO (Pioneer Hills)	inspection	8
Evergreen, CO	inspection	8
Aurora, CO (Saddlerock)	inspection	8
Porterville, CA	inspection	9
Juneau, AK	inspection	10

Total 64 sites